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IN THE COURT OF APPEALS OF INDIANA

SIDNEY SEYMOUR,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. 20A04-0601-CV-6
	)	
PENNY LANE,	)	
	)	
Appellee.	)	

APPEAL FROM THE ELKHART SUPERIOR COURT
The Honorable Benjamin Pfaff, Judge
Cause No. 20D01-9703-DR-222

October 18, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Sidney Seymour ("Father") appeals the trial court's grant of a protective order and emergency temporary custody of T.S. and J.S. (collectively, "the Children") to Penny Lane ("Mother") and the trial court's subsequent order modifying custody and awarding permanent custody of the Children to Mother.

We affirm.

ISSUES

1. Whether the trial court provided Father an adequate hearing on the protective order and emergency temporary custody order.

2. Whether the trial court abused its discretion by modifying custody and awarding permanent custody of the Children to Mother.[1]

FACTS

In January 1999, Father and Mother's marriage was dissolved, and Mother was given custody of the parties' three sons: B.S., born February 15, 1986; T.S., born December 7, 1992; and J.S., born June 28, 1995. In September 1999, Father filed a petition to modify custody. In October 1999, by agreement of the parties, Father was given custody of B.S., T.S., and J.S., and Mother was granted visitation.

On October 16, 2003, Mother, pro se, filed a petition for a protective order on behalf of the Children and a minute entry requesting temporary emergency custody of the

[1] Mother argues that we should dismiss Father's appeal because he did not file his Appellant's Brief in a timely manner following the completion and filing of the transcript. Our court docket indicates that an Amended Notice of Completion of Transcript was filed on April 25, 2006 and that Father filed his brief on May 25, 2006. Thus, our court records indicate that Father's brief was timely filed. *See* Ind. Appellate Rule 45(B)(1). Accordingly, we deny Mother's request to dismiss Father's appeal.

Children.[2] In her protective order petition, Mother alleged that Father and his wife, Lisa Seymour ("Stepmother"), had engaged in three incidents of family violence[3] in which they had choked, punched, and kicked T.S. and had thrown T.S. against a wall, causing him to bleed. The trial court found that the "children may be in danger if notice is given to [F]ather before [the] hearing."[4] (Appellant's App. at 6). The trial court issued an Ex Parte Order for Protection, which was to expire on October 16, 2005 and prohibited Father from, among other things, threatening acts of family violence and from contacting or communicating with Mother.[5] The trial court also granted Mother's request for temporary emergency custody of the Children and set a hearing. Thereafter, Mother filed a petition for modification of custody.

On October 27, 2003, Father and Mother appeared in court for a hearing on the emergency custody order. Father requested an evidentiary hearing on the protective order, and the trial court set the hearing for November. On November 20, 2003, the trial court held a hearing on the protective order and the emergency custody order. Prior to the hearing, the trial judge met in his chambers with the parties, who informed him that there was a criminal investigation against Father and Stepmother regarding the allegations contained in the protective order petition. During the hearing, Father moved

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[2] Mother also requested temporary custody of B.S. despite the fact that he had been living with Mother since February 2003.

[3] Mother alleged that these incidents occurred in May 2003, September 2003, and April 2002.

[4] Pursuant to Ind. Code § 34-26-5-6, "If it appears from a petition for an order for protection . . . that domestic or family violence has occurred . . . , a court may . . . without notice or hearing, immediately issue an order for protection ex parte[.]"

[5] The protective order was issued under a separate cause number from the dissolution cause.

to dismiss the protective order and the emergency custody order, and the trial court denied Father's request. The parties then argued about which of them had the burden of proceeding, and the trial court determined that Mother had the burden. The trial court gave Mother a chance to prepare her evidence and spoke with then ten-year-old T.S. in his chambers. Thereafter, Mother started to present testimony from D.F., a ten-year-old classmate of T.S, regarding one of the allegations of family violence contained in the petition for protective order. D.F. testified that Father and Stepmother were chaperones during a class field trip in May 2003, and during that time, Father hit T.S. in the chest, causing T.S. to stumble backwards and cry "really bad." (Tr. of 11-20-03 Hrg. at 26.) D.F. also testified that Stepmother "grabbed" T.S. and "dragged him[.]" *Id.* During D.F.'s testimony, counsel for Father kept objecting that Mother's counsel was leading D.F. During one of the objections, the following exchange occurred:

> [FATHER'S COUNSEL]: I'm not trying to be difficult, and I don't want to have this entire hearing occurring with me objecting to things. But we have to be particularly careful about leading with a child.
>
> THE COURT: Well –
>
> [MOTHER'S COUNSEL]: Judge, we might be here all day –
>
> [FATHER'S COUNSEL]: Well –
>
> THE COURT: You know, I've already made up my mind on what I'm going to do.
>
> [MOTHER'S COUNSEL]: Okay.
>
> THE COURT: And I'm kinda [sic] being forced to do a hearing. And the fact that I'm being forced to do a hearing is – is very unpleasant to me. If there are criminal charges being filed against step-mother and/or father – in fact, I have made up my mind. I'm going to continue the Order in place.

> I'm going to appoint a guardian ad litem to conduct an investigation. Mom will have custody. There'll be no visitation until the outcome of the criminal proceeding. Period. That's it. That's what we're going to do.
>
> [FATHER'S COUNSEL]: May I –
>
> THE COURT: You make your record . . . and you can certify it and file whatever interlocutory appeal you want to. Clearly, based upon what that little boy [T.S.] said to me, you guys have got some issues. Because he disclosed systematic routine violence in that home. Now you can shake your head all you want to, sir. But he disclosed it. He made it very clear to me that he does not want to be with you. I'm very sorry about that reality but that's his reality at this point in time and I'm going to be sensitive to a ten-year-old's reality. And we're not going to sit here and conduct some hearing with another ten-year-old witness where there's [sic] objections every two minutes . . . .
>
> * * * * *
>
> THE COURT: Okay. Court, based upon the in camera interview with the minor child [T.S.], finds that the minor child is at risk for further physical and/or emotional harm if the Court were to vacate the emergency order. The Court continues the emergency order in place. Appoints Paula Michalos [as guardian ad litem ("GAL")] to conduct an investigation and to talk to the parties and the minor child. Court reserves the right to modify its order based upon the report and recommendation from the GAL, without further notice . . . .

(*Id.* at 26-29.) Father filed a motion for certification of interlocutory orders but did not further pursue an appeal of the trial court's continuation of the protective order or the emergency custody order.

The trial court then held various hearings prior to holding evidentiary hearings on the modification of custody. For example, the trial court held a hearing on child support in March 2004. During that hearing, the parties stipulated that, per the GAL's report,[6]

[6] The GAL's report, which was filed with the trial court in February 2004, has not been included in either party's appendix.

counseling with Dr. Gerald Wingard should be commenced and that Dr. Wingard would make a recommendation as to when Father could begin supervised visitation at Child Abuse Prevention Services ("CAPS"). In June 2004, the trial court received a letter from Dr. Wingard requesting that Father have contact with the Children during counseling, and the trial court granted that request. Father was later allowed to have visitation with the Children at CAPS, but he did not exercise those visitation rights.

At some point, Mother stopped the Children's counseling with Dr. Wingard and had the Children attend counseling with their school counselor, Libby German. In December 2004, the trial court held a status hearing and addressed, among other things, the issue of Mother changing counselors. Thereafter, the trial court entered an order directing Mother to return the Children to counseling with Dr. Wingard.

In January 2005, after receiving a letter from Dr. Wingard that he was no longer providing counseling for divorce cases, the trial court appointed German to provide counseling to the Seymour family. Father then filed a motion for relief from that order, and in February 2005, the trial court held a hearing on Father's motion.

On March 24, 2005, the trial court commenced an evidentiary hearing on the issue of modification of custody. The hearing ended without completion of the presentation of evidence, and the trial court set the matter for further evidentiary hearings and reappointed Michalos as GAL to make a recommendation regarding custody and parenting time. Also, pending a final determination of the custody issue, the trial court ordered Father to have supervised visitation with the Children at CAPS.

The trial court held additional evidentiary hearings on the custody modification on June 6, 2005; June 9, 2005; June 22, 2005; June 23, 2005; August 8, 2005; August 9, 2005; and September 26, 2005. Thereafter, on November 7, 2005, the trial court issued an order, wherein it awarded permanent custody of the Children to Mother. Father now appeals the trial court's custody modification order.

DECISION

1. Hearing on Protective Order and Emergency Custody Order

The first issue is whether the trial court provided Father with an adequate hearing on the protective order and temporary emergency custody order. Father argues that he did not receive an adequate hearing on Mother's petition for a protective order and emergency custody order because he was not allowed to present testimony and cross-examination of witnesses.

However, the trial court has since made a final custody determination and the protective order has expired. Therefore, inasmuch as Father is attacking the validity of the trial court's emergency custody determination and issuance of the protective order, we are unable to render effective relief, and the issue is moot. *See Stratton v. Stratton*, 834 N.E.2d 1146, 1149 (Ind. Ct. App. 2005) (holding that the mother's challenge to the trial court's temporary custody determination was moot and her argument—that she was deprived of due process when the trial court modified temporary custody of the child without hearing the mother's evidence and failed to state reasons for the modification—was waived where the trial court had already entered a final custody determination); *Francies v. Francies*, 759 N.E.2d 1106, 1110-1111 (Ind. Ct. App. 2001) (holding that the

mother's challenge to the validity of the trial court's emergency custody determination was moot where the trial court had since made a final custody determination), *reh'g denied, trans. denied*.

2. Modification of Custody

The second issue is whether the trial court abused its discretion by modifying custody and awarding permanent custody of the Children to Mother. The modification of a custody order lies within the sound discretion of the trial court. *Spencer v. Spencer*, 684 N.E.2d 500, 501 (Ind. Ct. App. 1997), *reh'g denied*. "We review custody modifications for abuse of discretion, with a 'preference for granting latitude and deference to our trial judges in family law matters.'" *Kirk v. Kirk*, 770 N.E.2d 304, 307 (Ind. 2002) (quoting *In re Marriage of Richardson*, 622 N.E.2d 178, 178 (Ind. 1993)). The Indiana Supreme Court explained the reason for this deference in *Kirk*:

> While we are not able to say the trial judge could not have found otherwise than he did upon the evidence introduced below, this Court as a court of review has heretofore held by a long line of decisions that we are in a poor position to look at a cold transcript of the record, and conclude that the trial judge, who saw the witnesses, observed their demeanor, and scrutinized their testimony as it came from the witness stand, did not properly understand the significance of the evidence, or that he should have found its preponderance or the inferences therefrom to be different from what he did.

Id. (quoting *Brickley v. Brickley*, 247 Ind. 201, 204, 210 N.E.2d 850, 852 (1965)). "Therefore, '[o]n appeal it is not enough that the evidence might support some other conclusion, but it must positively require the conclusion contended for by appellant before there is a basis for reversal.'" *Id.* (quoting *Brickley*, 247 Ind. at 204, 210 N.E.2d at 852).

Indiana Code Section 31-17-2-21(a) governs the modification of a child custody order and provides, in part, that "[t]he court may not modify a child custody order unless: (1) the modification is in the best interests of the child; and (2) there is a substantial change in one (1) or more of the factors that the court may consider under [Ind. Code § 31-17-2-8] . . . ." When making a determination to modify a child custody order, "the court shall consider the factors listed under [Indiana Code Section 31-17-2-8]." Ind. Code § 31-17-2-21(b). Indiana Code Section 31-17-2-8 provides:

> The court shall determine custody and enter a custody order in accordance with the best interests of the child. In determining the best interests of the child, there is no presumption favoring either parent. The court shall consider all relevant factors, including the following:
>
> (1) The age and sex of the child.
>
> (2) The wishes of the child's parent or parents.
>
> (3) The wishes of the child, with more consideration given to the child's wishes if the child is at least fourteen (14) years of age.
>
> (4) The interaction and interrelationship of the child with:
>
> (A) the child's parent or parents;
> (B) the child's sibling; and
> (C) any other person who may significantly affect the child's best interests.
>
> (5) The child's adjustment to the child's:
>
> (A) home;
> (B) school; and
> (C) community.
>
> (6) The mental and physical health of all individuals involved.
>
> (7) Evidence of a pattern of domestic or family violence by either parent.

> (8) Evidence that the child has been cared for by a de facto custodian, and if the evidence is sufficient, the court shall consider the factors described in section 8.5(b) of this chapter.

Here, the trial court concluded that "based on the evidence and in light of the statutory mandates, that it is in the best interest of the children, [T.S. and J.S.], that the temporary order of custody be made permanent." (Appellant's App. at 29.) Father argues that the trial court abused its discretion by modifying custody because there was no evidence that demonstrated a substantial change that would call for a change of custody.[7] Mother argues that the trial court did not abuse its discretion by modifying custody because there was evidence to support the determination that there was a substantial change in at least one of the factors listed in Indiana Code Section 31-17-2-8. We agree with Mother.

During the custody modification hearings, there was testimony that addressed the various statutory factors. Mother testified that Father verbally abused the Children when he had custody of the Children. B.S., who was nineteen years-old at the time of the hearing and living with Mother, testified that when he lived with Father, there was "a lot of arguing and yelling" between Father, Stepmother, and the Children and that he had seen Father push T.S. up against the wall with his hand around T.S.'s neck. (Tr. of 6-6-05 Hrg. at 92.) David Lane, Mother's estranged husband, testified that when Father had custody of the Children and when he went with Mother to pick up the Children for a visit, Father frequently yelled at the Children and called them "jackasses" and "[l]ittle

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[7] Father does not challenge the trial court's conclusion that the custody modification would be in the Children's best interest.

assholes." *Id.* at 140. David Lane also testified that he had seen Father shove T.S. against a wall when they went to see T.S.'s school play in March or April 2002. German, the Children's school counselor, testified that the Children had told her that when they lived with Father they were afraid everyday and did not feel safe. During some of German's meetings with the Children, she had them draw pictures of their family life, and the Children drew pictures of times that Father and Stepmother yelled at them, kicked them, threw them against a wall, and slapped them. German testified that the Children's drawings and reports were indicators of physical, verbal, and emotional abuse by Father and Stepmother against the Children.

During Father's testimony, he denied that he and Stepmother had assaulted the Children but admitted that they had screamed at the Children. Violet Seymour, Father's mother, testified that Stepmother had gone to trial regarding an allegation of abuse against T.S. but that Stepmother was found not guilty. In the GAL's report and during her testimony, she recommended that Mother have custody of the Children and that Father have supervised visitation with the Children at CAPS. The GAL also testified that then twelve-year-old T.S. and then ten-year-old J.S. wanted to live with Mother and did not want to live with Father. The GAL further testified that some of Father's own references "did not make positive comments as far as verbal abuse and things that they observed and heard[.]" (Tr. of 8-8-05 Hrg. at 49.) The GAL testified that this fact concerned her because the Children had told her that, while they lived with Father, "they [were] hit with a broom and kicked and that they [were] cussed at and neighbors [heard]

it too and even their own references, [and that] it's hard not to believe that something has happened here." *Id.*

Father argues that there is a "lack of hard evidence regarding the abuse alleged in the [custody modification] petition." Appellant's Br. at 10. Father's argument, however, is nothing more than an invitation to reweigh the evidence and judge the credibility of the witnesses, which we cannot do. *See Haley v. Haley*, 771 N.E.2d 743, 747 (Ind. Ct. App. 2002). The trial court saw all the witnesses, observed their demeanor, and scrutinized their testimony as it came from the witness stand. As in *Kirk*, we are "in a poor position to look at a cold transcript of the record, and conclude that the trial judge, who saw the witnesses, observed their demeanor, and scrutinized their testimony as it came from the witness stand, did not properly understand the significance of the evidence" or that he should have found different from what he did. *Kirk*, 770 N.E.2d at 370. Based upon all of the evidence, we cannot say that the trial court abused its discretion by finding that a substantial change occurred in one of the statutory factors or that modification was in the Children's best interests. Accordingly, we conclude that the trial court did not abuse its discretion by granting Mother's motion to modify custody. *See e.g.*, *Bowman v. Bowman*, 686 N.E.2d 921, 927-928 (Ind. Ct. App. 1997) (affirming the trial court's order modifying custody).

We affirm.

BAKER, J., and NAJAM, J., concur.